

MARKETING OF TICKETS FOR COMMERCIAL AIR
TRAVEL

FEBRUARY 29 (legislative day, FEBRUARY 27), 1984.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and
Transportation, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 764]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 764) to assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill do pass.

PURPOSE OF BILL

The purpose of S. 764, as reported, is to amend specific portions of the final order of the Civil Aeronautics Board (CAB) in the Investigation into the Competitive Marketing of Air Transportation.

BACKGROUND AND NEEDS

Airline tickets are currently marketed by two principal methods:

1. Sales by individual airlines, using their own employees; and
 2. Sales by travel agents appointed by the airlines collectively.
- In recent years, approximately 60 percent of the air transportation purchased in the United States has been sold through agents.

Since 1946, the airlines have screened and supervised the qualifications of their agents through interline conference systems organized under the auspices of the Air Traffic Conference of America (ATC) for domestic services and the International Air Transport Association (IATA) for international services. These organizations develop in-

dustry-agreed standards aimed at ensuring that agents possess the necessary skills and financial responsibility to represent the airlines and to handle the valuable blank ticket stock and airline funds which agents must possess. These organizations have also designed and administered passenger area settlement plan (ASP) and cargo account settlement systems (CASS) which permit individual agents to settle financial obligations centrally with their more than 100 principals. The ASP also permits the services of all participating carriers to be offered on standardized ticket forms.

The ATC and IATA conference systems have evolved under the supervision of the CAB which has approved the agreements and immunized them from the antitrust laws for nearly 40 years. The CAB's public interest scrutiny has played a major role in shaping these agreements. CAB review of these agreements has been on grounds virtually identical to those now codified in section 412 of the Federal Aviation Act.

On December 29, 1982, CAB issued its final order in the Investigation Into the Competitive Marketing of Air Transportation, commonly referred to as the "Competitive Marketing Investigation." This order concluded nearly 3½ years of inquiry into the network of airline agency agreements.

The CAB's 1982 ruling was intended to apply the principles of the Airline Deregulation Act of 1978 and the International Air Transportation Competition Act to the marketing of air transportation through agents. Viewing those legislative policies as inherently hostile to agreements which "by definition will have anticompetitive aspects" (CAB Initiating Order 79-9-64), the CAB decided to withdraw the antitrust immunity under which the programs had always functioned as of December 31, 1984.

The CAB also determined that it would be immediately unlawful for airlines to adhere exclusively to collectively established standards in choosing agents to sell on-line services and equally unlawful to adhere exclusively to those standards for selecting interline agents after December 31, 1984. The CAB further decided that in selecting agents for joint accreditation programs after December 31, 1984, carriers could not exclude applicants substantially servicing their own accounts, such as business travel departments (BTDs) of large corporations. The ruling would also prohibit carriers in these programs from requiring such customers to identify their compensation claims as price reductions rather than agency commissions. Finally, the CAB held that the ASP should be opened to on-line agents and other new entrants in the marketing arena.

Carriers and agents, who had supported the existing systems almost without exception, were deeply disturbed by the CAB's actions. They believed that the termination of antitrust immunity could result in litigation whose costs and risks would make an interline program impossible for carriers to maintain. They also feared that unqualified on-line agents appointed by carriers who were parties to the conference agreements could tarnish the reputation of industry agents and undermine the industry-wide acceptance of agent-written tickets. They were

particularly concerned that the appointment of interline agents outside the existing system could destroy the industry agent concept as carriers sought individual arrangements with the new agents.

Carriers objected to bringing customer operations (such as BTDs) within the agency system because it thrust upon the carriers the burden of reviewing such transactions to determine whether direct selling was in fact involved, in order to determine the basis for compensation. This would defeat a significant part of the efficiency-producing role of automatic appointment and settlement. International carriers, in particular, were troubled by this action because foreign laws could be violated by nontariff discounts to large customers.

Potential new marketers of air travel, as well as the BTDs, support the CAB's decision. They believe that past and present agency agreements have served to stifle innovation in the sale of airline tickets, to the detriment of the public. They maintain that many of the restrictions in these agreements serve no purpose but to preserve what they see as a monopoly by accredited agents. The BTDs specifically feel that since they perform some functions similar to those performed by an accredited agent, they should be compensated by a similar commission arrangement.

LEGISLATIVE HISTORY

Senator Warner responded to the concerns of the carriers and agents by introducing S. 764 on March 10, 1983. As introduced, S. 764 would have required the CAB to reinstate the decision of its Administrative Law Judge who supervised the Competitive Marketing Investigation. S. 764 would thus have restored antitrust immunity for an indefinite period to the agency agreements and ASP. It would have permitted carriers to adhere exclusively to collectively established standards in selecting agents for both online and interline purposes and would have allowed those collective standards to continue to distinguish between third-party sales and customer transactions.

The Administrative Law Judge, in his decision, specifically conditioned the agency agreements to foreclose any collective agreement barring airline use of nonagent marketers, including enterprises like Ticketron who proposed to offer ticket dispensing convenience to consumers. There was considerable disagreement among the interested parties as to what a "nonagent marketer" was.

The principal differences between the CAB's approach and the original S. 764 lay in the balance between the risk of harming the existing agency system through antitrust exposure and the undermining of uniform standards and the opposing risk that marketing innovation might proceed too slowly in the absence of CAB program modifications and antitrust pressure. The CAB repeatedly professed its belief that the Airline Deregulation Act and International Air Transportation Competition Act required it to emphasize the benefits of innovation and to favor the imposition of antitrust risk as an element of the deregulated marketplace.

A hearing on S. 764 was held before the Aviation Subcommittee on October 4, 1983. The subcommittee heard testimony in support of the

CAB's decision from the CAB Chairman as well as officials of the Departments of Transportation (DOT) and Justice and the Office of Management Budget (OMB). Testimony in support of S. 764 was offered by representatives of travel agents and domestic and foreign airlines participating in the interline programs. The Committee also heard from representatives of major corporate business travel departments, and individual agents and airlines who highlighted particular issues. The Committee believes that the hearing's record fully documents the importance and broad scope of the controversy addressed by S. 764.

The hearing developed a consensus that agency services organized under the current interline system were providing the public with high quality, competent and financially responsible services at minimal administrative cost. Agency services permit consumers of air transportation to understand and choose intelligently among an array of airline services whose competitiveness are growing daily under deregulation. Agents are highly competitive amongst themselves and their number is growing steadily under the existing system which permits a single qualifications check to result in industrywide representation. Competition among airlines is also being enhanced by agency services which provide a ready made distribution system for new and expanding carriers.

The consensus on substantial present benefits turned to disagreement on the issue of how such benefits might be enhanced. The CAB and its supporters believed that antitrust exposure could persuade carriers to avoid undue restrictions in the scope and application of their agency accreditation and administration programs without disrupting the programs' efficiencies. The CAB discounted the threat that antitrust risk and expense might overwhelm the programs on the grounds that such exposure was common in unregulated industries and that strike suits were not a significant deterrent.

Carriers, however, were extremely concerned that treble damage incentives would lead to widespread attacks on the program at unacceptable costs and risks, compounded by the risk of program disruptions arising from injunctive actions. Agents expressed similar concern that their participation in program formulation could come under antitrust attack which agents, most of which are small businesses, could not withstand. All industry spokesmen were concerned that the uniform remitting cycles of the ASP were vulnerable to similar legal challenges. The Department of Justice, however, testified that the ASP raised no antitrust considerations whatsoever.

A similar division occurred with respect to appointment of agents outside the program. The CAB position was that such appointment was essential to innovation. The carrier and agent position, conversely, was that elimination of agent exclusivity could lead to high risk appointments by carriers in financial extremes with adverse effects on agent reputation and on public confidence in the distribution of air transportation. The critics of the CAB's approach also pointed out that qualified agents could be diverted from their industry agent capacity to specialized representation of dominant carriers in key loca-

tions. This possibility was especially troubling to international carriers with small scale operations in the United States who believed that viable agency program was a critical element of the "fair and equal opportunity" granted to them in bilateral agreements with the U.S. Government.

The debate over appointment of customers as agents revealed only a narrow difference. There was agreement that the end of unitary tariffs permitted airlines to give price discounts to customers preparing their own tickets, a practice widespread among large corporations. The apparent disagreement was on whether these corporations should be able to seek recompense in the form of agency compensation in addition to price discounts or whether a mechanism to distinguish self-dealing from third-party transactions was appropriate.

SUMMARY OF MAJOR PROVISIONS

The Committee bill would require the CAB to revise its outstanding order in the Competitive Marketing Investigation to afford continuing antitrust immunity to the agency accreditation and administration programs at issue. In mandating this action, however, the Committee wants it clearly understood that it does not intend to shield the competitive effects of the programs from continuing scrutiny. Nothing in S. 764 would preclude future disapproval of program provisions and a consequent withdrawal of antitrust immunity should significant changes in the competitive environment or the programs themselves warrant a different application of section 412 principles.

The Committee bill also would require a revision of the Competitive Marketing Investigation order so that agreed adherence to collective standards by conference airlines remains acceptable for interline, but not on-line, appointments. While the Committee is persuaded that the diversion of interline agents from the industry agent system could undermine that system to the detriment of consumers, the Committee is equally anxious to ensure a continuing outlet for agency innovation so long as the public and other carriers are not misled concerning the status of on-line agents. By taking this approach, nearly two-thirds of current sales by accredited agents would be opened up to competition from nonaccredited agents.

The Committee bill would further require the CAB to continue its approval of the program provisions which prevent customers substantially serving their own accounts from gaining industry agency status and prohibit agents from routinely treating self-dealing transactions as commissionable third-party sales. The Committee believes that compensation for the BTDs' efforts should occur as a price discount and not be injected into the administration of industry programs designed to efficiently produce a distribution network for sales to the public at large. The Committee also believes that it is the antithesis of deregulation to force the conference acceptance of these BTDs as agents when, in fact, they are purchasers of air travel. The BTDs are currently free to negotiate price discounts with the airlines. They should not be afforded government relief from their inability to achieve such discounts.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., February 27, 1984.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 764, a bill to assure the continued protection of the traveling public in the marketing of air transportation, and for other purposes, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, November 16, 1983. We expect that enactment of this bill would result in no additional public cost at the federal, state or local levels.

The bill states that the order issued by the Civil Aeronautics Board (Order 82-12-85) relating to the air transportation marketing system conforms with the policy of the Airline Deregulation Act of 1978. The bill, however, directs the Civil Aeronautics Board to make several modifications to its decision. The changes specified by the bill pertain to the Board's decision to eliminate the provisions that prevent air carriers from using non-accredited agents and that grant anti-trust immunity to industry marketing agreements.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

(1) The bill preserves certain portions of agreements between the airlines that would otherwise be nullified by a CAB decision. Since these agreements are between private parties and are not regulations, in the sense of rules issued by an agency, the bill would not result in an increase in regulations.

(2) The bill also restores antitrust immunity to certain aspects of the agreements referred to above. Such immunity entails supervision of those aspects of the agreements by the CAB or its successor agency. Such supervision would not be needed in the absence of this bill.

(3) As noted above, the bill preserves certain portions of airline agreements. The passage of S. 764 would also retain and/or restore antitrust immunity to the agreements. To the extent that these agreements enjoy antitrust immunity granted by a government agency, they result in a form of regulation of ticket distribution. The economic

impact of the agreements in issue is discussed in the main and minority view sections of the report.

(4) To the extent that continued supervision of these agreements by the CAB or its successor would be required, the bill would cause some increase in paperwork.

(5) S. 764 will have no impact on the personal privacy of any individual.

SECTION-BY-SECTION ANALYSIS

The Committee substitute for the original language of S. 764 contains two sections. Section 1 is a declaration of policy in seven parts.

Section 1

Section 1(1) acknowledges that the CAB has conducted a full investigation of the airline agreements at issue in the Competitive Marketing Investigation with the proper goal of increasing competition in the marketing and sale of air transportation. While S. 764 revises portions of the CAB's decision, it should not be construed as a condemnation of the CAB's procedures or objectives. S. 764 represents the minimum intrusion into the CAB's resolution of this important and difficult case that is consistent, in the Committee's judgment, with the public interest in agency services and the deregulation policy adopted in 1978. Section 1(1) is intended to recognize the enormous effort of the CAB and its staff.

Section 1(2) of the bill affirms the correctness, as a policy matter, of several major elements of the CAB's decision. Specifically, this section finds that, to the extent that the CAB approved the accreditation agreements, its action conformed to the policy of the Airline Deregulation Act. This section further finds that, to the extent that the CAB's decision provides opportunities for increased competition through the sale of on-line transportation, it is in conformity with the policy of the Airline Deregulations Act. This finding is, however, subject to an important qualification.

While the Committee believes, as did the CAB, that an individual airline's selection of ticket sellers for that airline's own services should not be controlled by industry-wide agreements, the Committee also believes that conference airlines should be able to enforce their accreditation standards and settlement procedures with respect to operations of accredited agents that are covered by the conference agreements.

The Committee is concerned about the ability of consumers to distinguish between the facilities and services of conference accredited agents and those of other sellers of airline services. This is an important issue because the tickets sold by persons not accredited through the conferences may not be recognized universally by airlines who have not agreed to accept traffic documents issued by those persons. Such tickets and other travel documents may therefore not carry all of the attributes of interchangeability, exchangeability and refundability that the public has come to associate with the documents issued by conference accredited agents. While the introduction of on-line ticket selling services may benefit the public through increased competition, there is a real danger that the public could be misled about the scope of authority held by such persons. This must be avoided.

Similarly, the Committee believes that individual airlines should retain the right to decline, individually, to deal with persons that do not meet qualifications deemed by those airlines, individually, as essential to a principal-agent or other retailing relationship. In order to preserve this inherent right, the airlines must be able to recognize the traffic documents issued by the new class of ticket sellers and to act in a timely manner to prevent the unwitting acceptance of them by counter, gate, and accounting personnel.

S. 764 does not specify the manner in which these concerns should be resolved by the CAB. The bill does establish a clear policy that these concerns must be accommodated in a practical manner that will avoid undue interference with the ability of the conference accreditation systems to operate in the presence of on-line sellers that are allowed by the CAB's decision and the bill. On the other hand, these goals must be accomplished in the least obtrusive manner possible. The Committee does not believe that the conference agreements should be allowed to put such new marketers at a competitive disadvantage beyond that needed to distinguish them in the public view. The recognition of the need for this accommodation is an essential predicate for the finding in section 1(2) that the disapproval of agreement restrictions on sales by on-line sellers is consistent with the Airline Deregulation Act.

Section 1(3) of the bill confirms that the maintenance of competency, honesty and efficiency in the marketing and sale of air transportation, which are central objectives of the conference accreditation programs, is vital to the integrated air transportation system. The Committee believes that the conference accreditation processes that have been approved repeatedly by the CAB for 40 years have made a significant contribution toward raising the level of professionalism in the marketing of air transportation and believes that continued encouragement of those processes is even more important now that Federal regulation of the provision of air transportation is being terminated.

Section 1(4) recognizes that the present nationwide distribution system of accredited travel agents is unlikely to be maintained unless means are assured for the conference airlines to continue agreements that promoted mutual acceptance of such agents. A high and continuing degree of cooperation and coordination among the conference airlines is essential to this objective.

Section 1(5) of the bill expresses other objectives of policy that are both consistent with airline deregulation and unlikely to be achieved if the ability of the conference airlines to reach cooperative understandings is impaired.

Section 1(6) of the bill finds that the public interest in preservation of the conference accreditation systems is best met by using oversight of administrative agencies to examine and approve or disapprove conference agreements in advance of their implementation.

Section 1(7) of the bill summarizes the dual objectives sought to be achieved by S. 764: (1) the preservation of the most important practical benefits of the CAB's decision; and (2) assurance that the conditions necessary to encourage the efficient provision of interline trans-

portation and the efficient settlement of accounts in the industry are maintained.

Section 2 of the bill contains specific directions to the CAB to modify the ordering language of the order accompanying its opinion in the Competition Marketing Investigation to effectuate the purposes of S. 764.

Section 2

Section 2(1) is intended first to restore approval to the domestic conference agreements of the ATC insofar as they preclude member carriers from using and compensating nonaccredited persons to write interline transportation involving the services of conference airlines. The bill does not require the conference airlines to continue that agreement; it merely permits them to do so without violating the Federal Aviation Act. Since the CAB's disapproval of similar agreement provisions dealing with on-line sales appears elsewhere in the CAB's order, the bill does not affect the CAB's decision with respect to such on-line sales.

The effect of section 2(1) is that the conference airlines may continue to agree that all sellers of interline transportation involving the services of such airlines must be accredited by the conference. Conversely, any conference airline will be free to deal with ticket selling services involving only that airline's own services on any terms and under any relationship, including principal-agent, that such airline deems appropriate. An on-line seller may, of course, enter into as many individual on-line relationships as it can negotiate. In theory nothing would prevent a seller from negotiating an on-line relationship with each of the conference airlines.

The bill will allow conference airlines to maintain the agreements under which their individually appointed on-line sellers are not eligible to make interline sales as long as their airline principals elect to remain parties to the present conference agreement. The Committee accepts the conference airlines' position that the agreement providing for mandatory accreditation for agents selling interline services is essential to the facilitation of interline air transportation and the maintenance of the industry agent concept. Because sufficient opportunities for new competition and innovation outside the conferences can be achieved in other ways, the Committee is prepared to permit the continuation of the system of mandatory accreditation for interline sales at this time. S. 764 does not, however, require that the airlines maintain this system. Conference airlines will remain free to amend the agreements and to withdraw from them when they believe such action is appropriate. Since those options will continue, and nonconference airlines will be free to arrange interline sales among themselves in any manner they choose, we are confident that retention of the interline accreditation agreement under current market conditions will promote competition. Should this expectation prove to be too optimistic, the agency with continuing jurisdiction over the agreements is free to step in.

Section 2(1) of this bill also restores approval beyond 1984 to the conference rules known as the 20 percent rule and the self-dealing rule. Under rulings of the CAB in 1981 and by virtue of the changes in the

regulatory regime produced by the Airline Deregulation Act of 1978, firms that wish to issue their own tickets and to otherwise conduct their own transportation in connection with air travel arrangements may negotiate with airlines for financial recognition of the services they perform. Under those same rulings and laws the airlines are legally free to grant discounts to such firms that account for the value of such services to the airlines. Whether the airlines wish to grant such discounts is an economic decision that each carrier must make for itself. But whether they do or do not choose to give such discounts, a clear and fair opportunity exists for firms engaging in operations of this kind to secure financial recognition for them.

Similar considerations affect the CAB's handling of the self-dealing rule. This part of the agreement prevents the conference airlines from paying commissions to accredited agents on sales made by such agents to themselves or to their affiliates. Conference airlines may compensate agents on any basis that they choose without regard to the conference accreditation agreements. Agent compensation may take any form, including direct commission payments, contributions to advertising and promotional efforts and others. In determining the level of payments to accredited agents, the airlines are free to take into account the total sales and services of any agent, including sales and services provided to the agent itself and its affiliates. The result is that the conference rule on self-dealing does not in practice prevent the conference carriers from reimbursing agents on self-dealing transactions. The effect of the conference rule is instead to prevent agents from claiming commissions in the ordinary course of business through the industry settlement system, shifting the burden of isolating self-dealing transactions to the airlines for determination of compensation policies.

Section 2(2) of the bill is intended to clarify and condition a finding made in the Competitive Marketing Investigation decision that access to the industry program for settling accounts among airlines and accredited agents (the ASP) is essential to competitive survival of non-accredited ticket sellers. This finding appears in the CAB's opinion but was not translated into an express condition on the ASP in the order accompanying the opinion. The stated reason for this omission was that the plan contained no language restricting access to it.

The net result of section 2(2) is to allow access to the ASP to any person who is willing to abide by the uniform cycles of the ASP and to utilize ticket documents compatible with the ASP's technology. The Committee is particularly concerned that no person be excluded from the ASP for competitive reasons.

Sections 2(3) and 2(4) of the bill treat the international accreditation system operated by the IATA in a manner exactly parallel to the disposition of the domestic ATC system. The CAB treated the domestic and international agreements identically with respect to the issue of mandatory accreditation and the bill tracks this approach.

Sections 2(5) and 2(6) of the bill restore the approval of certain provisions of the IATA program for accreditation of cargo agents. These provisions are parallel to those disapproved in the passenger agency programs and were treated by the CAB largely on the basis of its passenger analysis.

Section 2(7) of the bill restores approval beyond 1984 to the IATA agreements provisions establishing the so-called 20 percent rule and the self-dealing rule. These provisions parallel the ATC provisions explained with respect to section 2(1) of the bill. They should be, and are, treated identically.

Section 2(8) of the bill restores antitrust immunity to the approved agreements on an indefinite basis. This is to be distinguished from permanent immunization. As indicated in section 1(6) of the bill, it is the policy of this legislation that administrative rather than judicial processes be the vehicle for reviewing the continuing compliance of the agreements with competition standards. The insulation of such approved agreements from repeated attacks in other forums is the essential purpose of antitrust immunity conferred under section 414 of the Federal Aviation Act. Conversely, conduct by parties to such approved and immunized agreements that is outside the scope of the approved agreements is not immune from antitrust attack. S. 764 does not disturb this distinction.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of S. 764:

On November 16, 1983, the Committee met to consider S. 764. The result of this consideration was the adoption of a substitute version, offered by Senator Kassebaum, by a vote of 16 to 1. The amendment is designed to safeguard the consumer benefits of the present system while providing ample room for the innovation contemplated by the Airline Deregulation Act.

On the motion to report S. 764, with an amendment in the nature of a substitute:

YEAS—16

Mr. Goldwater ¹
 Mr. Danforth ¹
 Mrs. Kassebaum
 Mr. Pressler ¹
 Mr. Gorton
 Mr. Stevens ¹
 Mr. Kasten ¹
 Mr. Tribble ¹
 Mr. Hollings ¹
 Mr. Long ¹
 Mr. Inouye
 Mr. Ford
 Mr. Riegle ¹
 Mr. Exon
 Mr. Heflin ¹
 Mr. Lautenberg

NAYS—1

Mr. Packwood

¹ By proxy.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman) :

The bill, as reported, would make no changes in existing law.

MINORITY VIEWS OF MR. PACKWOOD

INTRODUCTION

In 1978, the 95th Congress enacted the Airline Deregulation Act of 1978 ("the Deregulation Act") (49 U.S.C. 1301); it was a banner year for competition, free markets, and the public interest.

The stated purpose of the Deregulation Act was the development of an air transportation system "which relies on competitive market forces to determine the quality, variety, and price of air services." In this the Deregulation Act was successful. Today air carriers are free to fly virtually any domestic route they wish, and to price their services at any level which they believe the market will bear.

Predictably, the first beneficiary of the resulting innovations and efficiency in the industry was the travelling public. Lower fares quickly became available to the average air travellers. New routes and new kinds of service soon followed. Later, as air carriers learned to live with deregulation and the opportunities it provided, the industry itself began to show strong signs of recovery, rewarding some carriers with record profits in 1983, vindicating those supporters of the Deregulation Act whose commitment to unrestricted markets and competition had been met with skepticism in the years preceding the act's passage.

If enacted, S. 764 as reported by the Commerce Committee, would turn back the clock on deregulation in the industry; the marketing of air travel would remain an anachronistic reminder of the inefficiencies created by artificial monopolies. It would stifle innovation in air-travel marketing by excluding from the system those would-be entrants whose ideas appeared unconventional. It would unfairly maintain the same kinds of barriers to entry in air-travel distribution that frustrated enterprising air carriers from competing effectively in the days preceding deregulation. If enacted, S. 764 would perpetuate the present closed-market system, a system friendly to existing travel agents, but hostile to new entrants and ultimately costly to the travelling public.

SUMMARY OF EFFECTS OF S. 764

The amended version of S. 674, as ordered reported by the Committee, would have the following effects:

1. Antitrust immunity would be indefinitely extended to the Air Traffic Conference (ATC) and International Air Transport Association (IATA) conference systems;

2. Although nonaccredited agents, would be allowed to sell "online," that is single-carrier transportation, they would be excluded from interline sales, the bread and butter of an agent's business, without which, no agent can effectively compete; and

3. All standards for accrediting new would-be agents would be continued indefinitely, including those that the CAB found clearly anticompetitive and likely to impede entry.

Contrary to the representations of its supporters, S. 764 is not a proconsumer bill. It is a bill intended to benefit travel agents. Its passage will foreclose technological innovations and consumer savings. Air travellers would be denied the convenience of purchasing tickets at retail outlets where they ordinarily shop. Were S. 764 to be enacted, barriers to entry will continue, and existing agents will have no incentive to reduce agents' commissions, which at 10 percent are several points above prederegulation levels. The use of unattended ticketing machines and other mechanized methods of ticket distribution, two-way personal computers for instance, would be impeded by S. 764's passage. Business travel departments would continue to be denied the right to sell their own tickets at a competitive cost advantage to their respective companies. Moreover, S. 764's enactment would discourage an entire spectrum of commercial entities such as banks, retail-store chains, and other financial institutions, from entering the travel agency business, due to the marketing limitations which S. 764 would place on their ability to sell tickets.

The administration shares my opposition to S. 764. Included at the end of my views are letters from Secretary of Transportation Elizabeth Dole, on behalf of both DOT and OMB, stating that she and OMB will urge the President not to sign the bill, if passed. A letter from the CAB Chairman, also included, expresses their opposition.

THE COMPETITIVE MARKETING INVESTIGATION

Four years ago, of its own accord and acting on its own mandate, the CAB initiated a reexamination of its historical approval of the anti-trust immunity extended to the airline agreements that govern travel agents. The so-called Competitive Marketing Investigation (CMI) which followed was a 3-year study of the then existing regulations and immunity governing the methods through which air travel has traditionally been marketed in this country.

As properly pointed out elsewhere in this report, the CAB's final order in the CMI was carefully crafted to incorporate the principles of the Deregulation Act and the International Air Transportation Act, into the air-travel marketing system. At present, all major airlines belong to conferences which attend to the mechanics of dividing fares between the airlines, and the licensing of travel agents. The conferences accredit agents according to standards designed to insure integrity in the system. They also enforce "exclusivity" clauses which oblige the airlines to either sell their tickets themselves, or through conference-accredited travel agents. It was these agreements which the CAB had protected from the reach of the antitrust laws for 40 years.

The CAB's final order properly approved the current system of accreditation. It disapproved, however, the exclusive aspects of the conference agreements, finding that such exclusivity served only to preclude new entrants from effectively marketing air transportation, and that the public interest would be well served by lifting the antitrust

immunity from exclusivity agreements. The principal purpose of S. 764 is to overturn key parts of the CAB order, and to maintain the artificial monopoly which travel agents presently enjoy.

Supporters of S. 764 have levelled a number of charges against the CAB's order in the CMI. Principal among them is the complaint that the CAB overruled the "factual" decision of its own Administrative Law Judge, Ronnie Yoder, in favor of policy judgments and economic theory. This is not the case. In reaching its decision, the CAB carefully reviewed the 40,000 page record in the case, a fact evidenced by almost 400 citations to testimony and exhibits from the administrative proceedings. Moreover, the CAB itself made factual findings in its order, albeit findings different than those offered by Judge Yoder. The judge found, for example, that were air carriers to appoint agents without accreditation, the public confidence in the travel agent system would decline. The CAB found, to the contrary; that the airlines had every incentive to satisfy themselves as to the reliability of an agent-applicant, and that the public confidence in travel agents would in no way suffer because of lack of accreditation. Likewise, whereas Judge Yoder found the potential for "chaos" in ticket marketing schemes, were the present barriers to entry to be lifted, the CAB pointed out that no such disruption had occurred in the year since the adoption of the CAB's decision. Thus, it is fair to say that although cognizant of the deregulatory principles which underlie the Deregulation Act, the CAB's conclusion were no more dictated by blind adherence to such principles than were Judge Yoder's conclusions compelled by his apparent belief in the benefits of regulation.

S. 764, AS AMENDED

It has been suggested that the revisions in S. 764, embodied in the substitute version of the bill offered by Senator Kassebaum and reported favorably by the Committee, is somehow less offensive to principles of unfettered competition and unrestricted entry than was the original S. 764. This is not the case. As noted elsewhere in this report, "the Committee bill would require the CAB to revise its outstanding order in the CMI to afford continuing antitrust immunity to the agency accreditation and administration programs at issue." Reduced to its essentials, this statement is an acknowledgement that S. 764's principal purpose is to put Judge Yoder's decision into effect, thereby maintaining the most anticompetitive features of the existing system and frustrating the natural tendency of market forces to eliminate them.

EXCLUSIVITY

In its final order, the CAB found that the "exclusivity" rule—barring non-conference-accredited agents from marketing airline tickets—was not needed to maintain the dependable service which travel agents have traditionally rendered the public. The CAB also found that exclusivity forced all agents to conform to the same methods of doing business stifling innovation in the marketing of air travel, for example discount ticket outlets and mechanized ticket dispensers. Accordingly, the CAB lifted the antitrust immunity from exclusivity.

Supporters of S. 764 maintain that the bill permits a retailer to sell tickets without being accredited. So it does. But such nonaccredited agents would only be permitted to sell on-line transportation. That agent would be forbidden to interline either passengers or baggage, even if both airlines involved permitted that agent to sell their tickets, so long as those agents and airlines remained conference system members. Will potential passengers rely on such a restricted agent? Not many. The bottom line is that nonaccredited agents cannot effectively compete with those whom the ATC has authorized. Thus, the so-called Committee "compromise" is no compromise at all, and still effectively precludes new competition in the industry.

Proponents of the bill argue that without exclusivity, "grocery stores and gas stations" will sell airline tickets. So they may, but only if the airlines believe that such agents are qualified, and will provide effective and reliable service to the public. Basic concepts of agency law ensure that no one will sell airline tickets without the permission of the airlines. The airlines have every reason to protect their own potential clientele, and every incentive to insist that such sellers are qualified. The CAB's decision frees airlines to appoint agents on their own terms—and to agree among themselves on standard qualifications—rather than binding the carriers to ATC enforced structures. S. 764 would maintain the ATC's control of airline decisionmaking with regard to the agents with whom those airlines choose to deal.

ANTITRUST

Continued antitrust immunity is another troublesome aspect of S. 764. Supporters of the bill argue that withdrawal of the immunity which protected the industry at its inception will cast the agency system into chaos. Without antitrust immunity, they argue, airlines now participating in the system will withdraw, rather than risk antitrust litigation. Such arguments are without merit. Were "interline" exclusivity eliminated and existing barriers to entry abandoned, it is the CAB's view that the remaining agreements would not be anticompetitive. The Department of Justice shares this problem.

Critics of the CAB's decision and supporters of S. 764 are frequently heard to voice concerns about the "flood" of antitrust litigation which would follow the lifting of antitrust immunity. Assistant Attorney General William Baxter, head of the DOJ's Antitrust Division, addressed such concerns when he testified at the hearing on the bill. Mr. Baxter was unequivocal when he stated:

1. there is nothing about the Area Settlement Plan, *per se*, which raises "even un-serious antitrust problems;"
2. "there is nothing about interlining that is anticompetitive or would give rise to problems."

Parenthetically, it should be added that what did trouble Mr. Baxter was "a cartel of travel agents who wield enormous influence by their . . . implicit threat to . . . divert business away from a carrier which introduced or attempted to introduce new and innovative distribution methods." It is this cartel which S. 764 would preserve.

Arguments which assume that the withdrawal of antitrust immunity will cause the agency system to collapse in a deluge of litigation are

further weakened by the fact that some airline agreements, the Airline Clearinghouse for instance, have not had antitrust immunity in 40 years, yet have failed to generate lawsuits. Moreover, antitrust suits are a major undertaking and extremely expensive; they will not be undertaken lightly. Frivolous actions do not threaten the system.

CONCLUSION

Those who argue that this is a consumer protection bill are mistaken. It is a travel agent protection bill. It would insulate travel agents from competition. In so doing, it will deny consumers those economies and innovations in air-travel marketing which competition has time and again been shown to promote and which the Deregulation Act was intended to perpetuate.

Contrary to the representations of the bill's supporters, this bill is not essential to the survival of the small travel agent. The travel agent's own witnesses have testified that opening up the market to new competitors would cost them only 2 percent of their business. The only business likely to be lost is that of high-volume corporations, already served by very large, rather than very small, agents.

Even after substantial testimony to the contrary, the argument is still heard that this bill is pro-deregulation because it will insulate these carrier-agent agreements from further review by the CAB. Such a restriction of agency review should not be mandated by special-interest legislation, especially where, as here, the result may prevent any future consideration of the public interest with regard to airline travel agent conference agreements.

The Airline Deregulation Act of 1978 reflected the considered judgment of Congress that the air transportation industry, and especially consumers, would benefit if the industry were subjected to the same competitive forces that had so well served other sectors of the economy. The CAB's Competitive Marketing Investigation concluded that the airline ticket marketing system was distorted, inefficient, and lacking in meaningful incentives for innovation and competition. The CAB's order was carefully designed to remedy these ills. To legislatively reverse the CAB at this juncture would be a mistaken concession to a special interest—travel agents—who neither need, nor would be substantially benefitted by, the provisions of S. 764.

BOB PACKWOOD.

THE SECRETARY OF TRANSPORTATION,
Washington, D.C., November 15, 1983.

HON. BOB PACKWOOD,
*Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I am writing with regard to the planned markup of S. 764, "The Air Travellers Security Act of 1983". For several important reasons, the bill should not be reported favorably by the Committee, either in its original form or as in a proposed "compromise".

I have communicated the Department's strong opposition to S. 764 to its sponsor, Senator John Warner. The bill has the effect of reversing

the Civil Aeronautics Board's carefully reasoned decision in the Competitive Marketing Investigation (CMI). In my judgment, the Board's withdrawal, in a responsible and phased manner, of immunity from antitrust laws with respect to certain forms of carrier and agent conduct was wholly consistent with the mandate of the Airline Deregulation Act of 1978. Withdrawal of immunity will put an end to government-sanctioned barriers to developing innovative methods of ticket marketing.

The most harmful effect of S. 764 (and the virtually identical "compromise") is to perpetuate artificial government protection for one part of the air transportation industry. S. 764 will, for the most part, reserve to accredited agents the sole and exclusive right to market tickets on behalf of nearly all air carriers. DOT strongly opposes this protection as not only unnecessary to the maintenance of a sound marketing system but also as fundamentally unfair to the remainder of the industry, which is engaging in the challenging business of meeting competition in all its forms.

Air carriers are struggling to reduce their expenses, and they could benefit significantly from the opportunity to experiment with innovative, lower-cost sales mechanisms, as would their customers. At a time when many carriers are asking their employees to make important financial sacrifices, the federal government should not be party to putting other areas of cost-containment beyond reach. Yet S. 764 would effectively stifle any possibility for innovation in the marketing of air transportation. Moreover, it would do so by substituting a legislative mandate for the Board's administrative decision, in an area that traditionally has been properly the subject of administrative decision-making.

Despite protestations by the carriers and agents, there is no credible evidence that the travel agent system will collapse if not permitted to continue as the exclusive marketing arm for interline transportation. First, the Board's CMI decision does not force a single change from present marketing strategies. Second, the travel agents are a strong, valuable part of the airline industry, and they do not need continued government protection for those marketing practices that the Board has found to be anticompetitive.

In either its original form or as revised in the compromise, I would be unable to recommend that the President sign this bill. The Office of Management and Budget advises that its advice to the President would be identical to the Department's.

Sincerely,

ELIZABETH HANFORD DOLE.

CIVIL AERONAUTICS BOARD,
Washington, D.C.

Hon. BOB PACKWOOD,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: I have recently received a copy of a revised S. 764, concerning the Board's decision in the *Competitive Marketing Investigation*. It has been suggested that the revisions to S. 764 constitute a compromise that is more acceptable to the Board than the

earlier version. It is not and the Board is opposed to any legislation that would override the CMI decision of last December. The bill retains the most anticompetitive features of the earlier version, eliminates the substantial public benefits that would be gained if antitrust immunity were withdrawn, and creates the same administrative problems. The revised bill is in no way, therefore, a compromise.

Competitive Effects

The revised S. 764 would keep the most anticompetitive features of the existing system in place and preclude market forces from eliminating them by retaining antitrust immunity for the agency programs.

Actually, the real effect of the revisions to the Board's order is to put the ALJ's decision into effect, as does the earlier bill. The only difference from the ALJ's opinion would be that his marketing/agency distinction would be replaced by the Board's transitional online/interline distinction.

The Board only created the online/interline distinction as a transitional measure. It was never intended to be of indefinite duration. In fact, the Board specifically found that an interline restriction of indefinite duration was not justified.

The revised S. 764 does not stop unaccredited persons from writing interline tickets, which it would do if it believed non-accredited interline ticket writing was a threat to the interline system. BTDS currently write and would continue to be free to write interline tickets under the new S. 764. Rather, S. 764 merely precludes them from being paid for writing them. Compensation for writing tickets is the essential feature of any marketing system.

Nor does the revised S. 764 permit meaningful competition to travel agents. There are two ways to discourage entry: outright prohibition and the imposition of costs that make it uneconomic to operate. The original S. 764 took the former approach, the revised version the latter. It denies travel agents' competitors access to one-third of the air transportation market (interline traffic) and puts them at a significant cost disadvantage for the other two-thirds, by denying them access to the Area Settlement Plan.

While accompanying explanatory language suggests the question of access to the ASP is open, the bill itself forbids the Board from imposing an access condition on the Area Settlement Plan despite the fact that the Board found it essential in order for a new marketer to compete. In fact, by creating a new exclusion from the ASP for new retailers, the bill is more restrictive than ATC represented the ASP agreement to be even before the ALJ's recommended decision.

It is not true, as accompanying explanatory language suggests, that the airlines will be able to appoint ticket sellers on any terms they want under the new bill. They can be forbidden by carrier (ATC or IATA) agreement from giving a new outlet the right to sell interline transportation.

Antitrust Immunity

Perhaps the most harmful aspect of the revised S. 764 is that it continues antitrust immunity for the agency programs. Only by eliminating antitrust immunity could the Board, or Congress, subject the

air transportation marketing industry to the full force of competitive market pressures.

The revised S. 764 does nothing to lessen agents' power to boycott airlines if they use new marketing outlets. Because the agreements will continue to have antitrust immunity, agents can use their collective market power against carriers with little regard for the antitrust laws.

Administrative Problems

Like the earlier version of S. 764, the revised S. 764 raises a number of administrative problems. It too constitutes highly unusual Congressional interference in a single administrative agency decision.

In addition, the same inflexibilities remain as with the ALJ's decision. Whereas policy guidelines enacted by Congress are flexible to adapt to the times, legislating changes to a Board order, not easily available to the public, would stultify the system and be difficult to implement.

Because the Board's opinion, explaining its decision, would be in fundamental disagreement with the legislated final order, the Board could offer no guidance as to the policy objectives the legislation sought to achieve. The Board would have no explanation for the clear inconsistency with the principles of the highly regulatory measure and the pro-competitive principles of sections 412 and 414 as they were clearly enunciated in the Airline Deregulation Act.

Administrative Review

Moreover, the bill does not give the Board the power to review approvals and immunizations. While accompanying explanatory statements suggest this would be allowed, because the bill sets aside the Board's judgment on several provisions (the 20% rule and the common control rule, for example) and adopts the S. 764 policy statement, the Board at a minimum, could not re-examine provisions legislatively approved in the bill and probably could not exercise any meaningful, pro-competitive review of any provisions filed later. If the policy statements of the old S. 764 are retained, all provisions of the ATC and IATA agreements would enjoy a strong presumption of validity.

In fact, the Board's approvals of many of the accreditation standards were temporary and transitional. While the Board believed that some of the provisions were suspect, it nevertheless approved them because its order created substantial incentives to delete unnecessary provisions and tailor overbroad ones by its removal of antitrust immunity. If immunity is retained, the Board should have clear authority to pass on each individual provision, based on the existing CMI record.

For these reasons, the Board opposes the revised S. 764 and we strongly urge that it not be passed.

Sincerely,

DAN MCKINNON.

